No. 11,479

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

EARL HOINESS,	*Appellant,*
vs.	
UNITED STATES OF AMERICA,	*Appellee.*

BRIEF FOR APPELLEE.

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STATEMENT OF PLEADINGS.

Appellee is not in serious disagreement with appellant's statement of the pleadings. It is desired, however, to stress the fact that the American South African Line Inc., and all respondents other than the United States, were dismissed in the lower Court and this appeal involves only the United States as appellee. This is admitted in the appellant's brief, page 2.

OPENING STATEMENT.

Appellee desires to acquaint the Court with a brief statement of the position assumed by the parties litigant. Appellant in his brief claims that the District Court was in error and that said Court had jurisdic-

tion of the subject matter of this libel and should have heard and determined it upon the merits and he now seeks to have this Court sit as trier of the facts in the first instance under the guise of calling such first factual adjudication a trial *de novo*. As far as can be ascertained from the authorities, this has never been accomplished heretofore. This Court, we do not believe, is in position to judge the credibility of witnesses that appeared before the trial Court. This is a matter in which the credibility and conduct of the witnesses was of prime importance and this Court, were they to follow appellant's reasoning, would be deprived of this all-important phase of the evidence upon which appellees relied heavily. At the risk of being repetitious, we point out that the District Court has never at any time considered the facts of the cause on its merits. Seven witnesses testified in person and the evidence of only one witness was taken by deposition. Additionally, there were some medical reports received in evidence.

The failure of appellant to prove his residence as being within the district where the libel was filed and his further failure to prove the fact of the vessel's presence within the United States or her possessions constituted fatal error.

It is the appellee's position that the District Court properly held and determined that it had no jurisdiction to determine the merits of this matter and, therefore, the sole question for this Court to consider and decide is whether the District Court had jurisdiction.

APPELLEE'S REPLY TO SUMMARY OF ARGUMENT AND ARGUMENT OF APPELLANT.

On page 13 of appellant's brief, he argues that appellee filed an answer and engaged in the trial of the case and that it, therefore, *"submitted to the jurisdiction of the Court."* Appellee did not, by appearing at the trial of this matter, waive any jurisdictional questions. The United States left *"all questions of jurisdiction to the court."* (Ap. 11.) As is well known to this Court, Admiralty practice is extremely liberal in permitting seamen to amend their libels to conform to the proof and appellee did not at any time during the course of the entire trial of this cause, right up to the last minute thereof, know what testimony or other evidence would be offered by appellant to prove facts necessary to vest jurisdiction in the District Court. Indeed, after submission and decision by the District Court, appellant endeavored to supplement his then defective case with the necessary jurisdictional facts. The motion, in an attempt to accomplish this end, was properly denied by the District Court. Appellant in his brief confuses the issue of "jurisdiction" with that of "venue" and indeed on page 13, he claims that appellee submitted to the jurisdiction by appearance and thereafter states on the same page that the prerequisite as to jurisdiction contained in the Suits in Admiralty Act are merely questions of venue rather than jurisdiction. He, thereafter, relies on the so-called jurisdictional provisions of the Jones Act, which we have heretofore shown to this Court in the matter of *Kakara v. United States,* 1946 AMC 1552 were superseded by Public Law 17,

which confines libelant seamen in the employ of the United States to the jurisdictional limitations contained in the Suits in Admiralty Act, which are absolute and prerequisites to jurisdiction.

The same counsel as appearing for appellant argued in the case of *Kakara v. United States* (supra), that the provisions of the Jones Act superseded those of the Suits in Admiralty Act and urged that the three-year period of limitation, presumably provided for by the Jones Act controlled rather than the two-year provisions found in the Suits in Admiralty Act. This Court in refusing to follow such proposition held:

> "However, we are of the opinion that with due regard to these principles of construction (Cf. White v. United States, 305 U.S. 281, 292), and assuming that the Jones Act now has a three-year statute of limitation, Congress in Public Law No. 17 intended the two-year statute of limitation to apply. *Appellant's contention that the limitation provision of sec. 5 does not apply would require a holding that the limiting provisions of the Act do not apply.* The 'rights' and 'privileges' of seamen include the right to the remedy of an action 'in rem' against the vessel for injuries arising from her unseaworthiness and under the Jones Act, and to the remedy of a suit at law in the state or federal courts, including remedy of trial by jury. It cannot be contended that despite its provisions that seamen's rights are to 'be enforced pursuant to the provisions of the Suits in Admiralty Act,' Public Law No. 17 enlarged that Act to give to seamen as against the United States all these other remedies available to them. We are unable to see why a remedial extension of the

two-year statute of limitation of the Suits In Admiralty Act to three years should be singled out from these other remedies as alone conferred by Public Law No. 17. Cf. Crescitelli v. United States, 1946 AMC 655 (D.C.E.D. Pa.), decided April 26, 1946; Piastik v. United States, 1944 AMC 1350; Keil v. United States, 1946 AMC 653 (D.C.D. Md.), decided April 5, 1946.

The decree is affirmed." (Italics ours.)

To the same effect, see also *Crescitelli v. United States,* 159 Fed. (2d) 377 (C.C.A. 3rd), wherein the Third Circuit Court of Appeals in concurring with this Court stated as follows:

"We are impressed by the point made in the Ninth Circuit opinion that if the time limitation provision of Section 5 of the Suits in Admiralty Act does not apply, such a holding would require *'that the other limiting provisions of the Act do not apply.'* We do not think it would be seriously contended, for instance, that a seaman could insist on a libel in rem of a vessel belonging to the United States, or that he could sue the United States in any State or Federal District Court, or that he could insist on a jury trial. In other words, we think Congress meant what it said when, in the Clarification Act, it said that the rights to be pursued by an American seaman against the United States were to be pursued as prescribed by the Suits In Admiralty Act. We think there is no more reason to disregard the time provisions in the Suits in Admiralty Act than any others. Affirmed." (Italics ours.)

The requirements contained in the Suits in Admiralty Act to the effect that such suits shall be brought in the District Court of the United States for the District in which the parties so suing, or any of them, reside or have their principal place of business in the United States, or in which the vessel or cargo charged with liability is found, are additional jurisdictional requirements to the bringing of the suit within two years, as is also required by said Act, and there is no reason why each of these requirements should not have equal force. None is of less importance than the others and each is jurisdictional.

Appellant, on page 20 of his brief, has quoted from the House of Representatives Report No. 107 of the 78th Congress, 1st Session, in an effort to show that it was the intent of Congress that all rights had by seamen under the Jones Act shall apply without reference to the Suits in Admiralty Act. The verbiage quoted by appellant himself shows conclusively that Congress had no intent other than that such actions would be controlled by and be subject to the Suits in Admiralty Act.

Additionally:

House of Representatives, 78th Congress, 1st Session Report No. 107, 1943 AMC p. 623:

> "The various rights and remedies under statute and general maritime law with respect to death, injury, illness, and other casualty to seamen, have been rather fully set forth hereinabove. Under clause 2 of section 1 (a) these substantive rights would be governed by existing law relating to

privately employed seamen. *The only modification thereof arises from the remedial provision that they shall be enforced in accordance with the provisions of the Suits in Admiralty Act.* The procedure is appropriate in view of the fact that the suits will be against the Government of the United States. In such a suit no provision is made for a jury trial as may otherwise be had in a proceeding such as one under the Jones Act for reasons set forth in the letter of the Attorney General (September 14, 1942). The provision of the Suits in Admiralty Act that suit lies thereunder only if the ship involved is employed as a merchant vessel or a tugboat is waived for the purpose of section 1 so that the claim may be enforced regardless of the nature of the vessel on which the seaman is serving as an employee of the War Shipping Administration. To prevent unnecessary or premature litigation against the United States, it is required that before suit there shall be an administrative disallowance of the same in accord with rules or regulations to be prescribed by the Administrator, War Shipping Administration." (Italics ours.)

Appellant on page 14 of his brief claims that the District Court in hearing this matter put all the parties to the trouble and expense of litigating the case only ultimately to tell them that they ought to be relegated to the proper District Court. It is the belief of appellee that any fault in this connection is chargeable solely to appellant himself. He was the moving party in this litigation and the one who failed to prove jurisdictional facts if they existed.

At this point we think it appropriate to remind this Court that appellant had more than three months' time following the final decree within which to file a libel against the United States in the proper district where such Court would have had jurisdiction.

All of the following cases cited by appellant with the exception of *Carroll v. United States,* 133 Fed. (2d) 690, which fully supports appellee, involve questions of jurisdiction under the Jones Act alone:

Brown v. C. D. Mallory & Co. (CCA 3rd), 122 Fed. (2d) 98;

Carroll v. U. S. (CCA 2nd), 133 Fed. (2d) 690;

Leffelland v. Detroit & Cleveland Nav. Co. (DC NY), 16 Fed. (2d) 1011;

Villard v. U. S. Shipping Board Emergency Fleet Corp. (DC NY), 1 Fed. (2d) 570;

Caceras v. U. S. Shipping Board Emergency Fleet Corp. (DC NY), 299 Fed. 968.

All were brought under the Jones Act alone and all were against private employers and none of them involved the jurisdictional questions presented by the enabling provisions of Public Law 17, upon which appellant himself relies for his cause of action in this case and without which he would have no cause of action whatever against the United States. (Ap. 4.) None of the cited cases are, therefore, applicable.

The appellant relies upon the case *Jarnvagsstyrelsen v. United States* (19 Fed. (2d) 761). This cause involved a libel brought by a Swiss corporation with no office or place of business or agent in the United States, and thus left libelant without residence within

the United States and consequently without a forum in which to prosecute his claim. It is, therefore, substantially and radically different from the present cause. Judge Learned Hand, vigorously dissenting, held:

> "The libel did not allege that the ship was within the United States, a jurisdictional averment under Blamberg v. U. S., 260 U. S. 452, of which there could be no waiver by appearance or otherwise, since it went to the power of the court."

In the *McGhee case v. United States,* 1946 AMC 487, the Second Circuit held that the libelant, an alien seaman who had no residence in the United States and whose ship had been sunk at sea might bring suit in any District. To have held otherwise would have, of course, completely deprived McGhee of any forum in which to prosecute his claim. The Court went to some pains to point out that alien seamen seldom, if ever, "resided" in the United States. It is obvious in the *McGhee* case that the vessel which was sunk could never be in the jurisdiction of the District Court. It is not believed that the Circuit Court could have reached any other decision under these special facts, none of which were present in this cause.

Appellant has cited and relied on the case of *Carroll v. United States* (supra), which stands clearly for the principle advocated by appellee that the full requirements of the Suits in Admiralty Act and Public Law No. 17 must be fully and exactly complied with in respect to the filing of the libel in the district of residence of the libelant or in the district in which the vessel is located at the time of the filing of the libel.

After discussing at considerable length the fact that libelant Carroll did not file in the district wherein the vessel was located, and further considering what constituted his residence, the Court decided:

> "The Judge should have dismissed the libel as to the United States, either because it lacked substantive jurisdiction, or because the suit was brought in the wrong district."

Following the dismissal of the United States from the action, the Court considered the judgment against the General Agent on the authority of *Brady v. Roosevelt Steamship Company,* 317 U.S. 575, 63 Sup. Ct. Rep. 425, 87 L.Ed. 471.

The leading case in the United States on the jurisdictional questions here presented, we believe, is that of *Blamberg Bros. v. United States,* 260 U. S. 452, 67 L. Ed. 456. In that case a libel was brought for recovery of certain cargo damage. The United States, as in this action, answered on the merits. The respondent alleged, among other things, that it was advised that the barge was in Havana and had no knowledge when it would arrive within the jurisdiction of the Court. The libelant claimed under the facts as alleged that under the Suits in Admiralty Act, a right to bring a libel *in personam* was created as a substitute for a libel *in rem,* and that the presence of the barge in the jurisdiction of the Court was not essential to such jurisdiction *in personam.* The Court said:

> "The District Court, on the facts stated, held that it was without jurisdiction, under this statute, to entertain a libel in personam against the United States. We agree with that holding * * *"

and further held in closing their opinion:

> "All we hold here is that the District Court was right in construing the second section of the Suits in Admiralty Act not to authorize a suit in personam against the United States as a substitute for a libel in rem when the United States vessel is not in a port of the United States or of one of her possessions."

A case exactly in point is that of *Abbott v. United States of America,* 1945 AMC 728. The libelant, a resident of either Nova Scotia or Boston, Massachusetts, and whose only New York residence was while hospitalized, brought suit in the New York District Court. The Government answered as was done here, and the appellant claimed, as is now being done before this Court, that by pleading to the merits respondent had waived his objections as to what was called "mere venue." Judge Knox, in dismissing the libel, held as follows:

> "It is argued, nevertheless, that his non-residence here is at most a mere matter of venue, and that respondent, by pleading to the merits, has waived objection thereto. (Commercial Trust Company v. U. S. Shipping Board, 48 F. (2d) 113; Kunglig Jarnvagsstyrelsen v. United States, 1927 AMC 866, 19 F. (2d) 761.) The general rule that I am thus asked to follow is, I think, inapplicable here. Respondent's response to libelant's averment of residence in this district put a material fact in issue, and it, if libelant is to prevail, like other affirmative and material allegations of the libel, must be proved.

In other words, the fact that libelant did not reside within this district did not appear on the face of his libel, and respondent was thus in no position to raise the question before the date of trial. (See Roberts v. Lewis, 144 U.S. 653.)

* * * On this state of facts, this case falls squarely within the ruling of the Appellate Court of this Circuit in Carroll v. United States, 1943 AMC 339, 133 Fed. (2d) 690, where, following Blamberg Bros. v. United States, 260 U. S. 452, 1923 AMC 50, it was held that a condition of substantive jurisdiction in suits under the Suits in Admiralty Act is that the vessel should be within this country when a libel seeking to hold the United States is filed. If it be, as the court intimated, that this difficulty might possibly be overcome by dispensing with a new libel if the ship were within the country at the time of trial, it appears that the Beauregard was not then here. But assuming that the ship's presence at some other port during the pendency of the libel conferred substantive jurisdiction on this court, the venue of the suit is wrong, and the libel must be dismissed for lack of jurisdiction.

Libelant's argument that Carroll v. United States was erroneously decided falls upon ears that necessarily must be deaf."

In the case of *Barnes v. United States,* 67 Fed. Supp. 571 (S.D.N.Y.), respondent, United States of America, challenged the libel on the ground that the Court was without jurisdiction since the libelant was not a resident of the district and the ship upon which the deceased seaman was injured was not within the

jurisdiction when the libel was filed. The libel was brought under the Suits in Admiralty Act. The Court after considering *McGhee v. United States, supra, Sawyer v. United States,* 66 Fed. Supp. 271, and *Carroll v. United States, supra,* stated at page 573:

> "It follows that the exceptions must be sustained as to the United States and the libel dismissed; and by reason thereof, in view of Section 2 of the Suits in Admiralty Act, the libel must likewise be dismissed as against the War Shipping Administration."

The questions of law decided by this case are identical with those presently before the Court.

In the *Anna E. Morse,* 287 Fed. 364, the Court stated:

> "For these reasons I feel constrained to decline to follow the opinion in the Isonomia case, however much I respect the ability of the court rendering it. My conclusion is that where the vessel is alleged to be at a place shown to be within the jurisdiction of the United States, the libel may be filed in any district in the United States, where a party resides or has its principal place of business, or in which the vessel or cargo charged with liability is found. This is strictly in accordance with the opinion of the Supreme Court in Blamberg Bros. v. United States, 43 Sup. Ct. 179, 67 L. Ed (Jan. 2, 1923), where the court says:
>
> " 'All we hold here is that the District Court was right in construing the second section of the Suits In Admiralty Act not to authorize a suit in per-

> sonam against the United States as a substitute for a libel in rem where the United States vessel is not in a port of the United States or of one of her possessions.' "

The case *Nahmeh v. United States,* 267 U.S. 122, 69 L.Ed. 537, held each of the requirements of the Suits in Admiralty Act to be jurisdictional and comments at length upon the ruling of *The Isonomia,* 285 Fed. 516 (CCA 2nd), which held that the three possible places of jurisdiction under the Act should not be held to be cumulative but should be considered distributively.

This case does not in any sense stand for the proposition advocated by appellant. The Supreme Court was fully cognizant of the jurisdictional requirements of the Suits In Admiralty Act, which is clearly demonstrated by the following appearing in its opinion:

> "The opinion in the Isonomia case was carefully prepared, but we think that the rule as to a strict construction of the language of statutes providing for suits against the United States was there carried too far. In taking away what was then the law, namely, the right of claimants to sue merchant vessels of the United States as if they were private vessels, Congress was evidently anxious (126) to consult the convenience of intending libelants as far as it could, and as the United States was present every where in the United States, it names as the proper place for suit either the place of the residence of the parties suing, or of any one of them, or their principal place of business, or where the vessel or cargo charged with liability was found."

The Court finally concluded:

> "We think, therefore, that the suit brought in the district where the libelant resided was a suit brought in accordance with § 2, even though it would have been an action in rem between private parties, and that it made no difference where the vessel then was, *provided only that it was within the jurisdiction of the United States.*" (Italics ours.)

It can be stated for a certainty that in this case the Supreme Court has held that such libels as the instant one *must* be brought in the district where the libelant resides and only when the vessel is within the jurisdiction of the United States. The libel also could have been brought in any district where the vessel was found irrespective of libelant's place of residence.

In *Metaxas v. United States,* 68 Fed. Supp. 667, it is stated:

> "Clearly venue in the suit at bar is properly laid in this Court if (1) the libelant resides in the district, or (2) has his 'principal place of business in the United States' in the district, or (3) the vessel was found in the district at the time the libel was filed. Thus Congress has in express words granted to American Seamen the privilege of suing the Government in any one of possibly three different districts—whichever best suits the convenience of the libelant. Nahmeh v. United States, supra, 267 U.S., at page 126, 45 S.Ct. 277, 69 L.Ed. 536."

To the same effect, see *Axtell v. United States,* 286 Fed. 165, and *The Elmac,* 285 Fed. 665.

Appellee believes that the case of *Sawyer v. United States of America,* 66 Fed. Supp. 271, considers the points of law herein involved more fully than do any others. A full and intelligent discussion is had of all of the then relevant reported cases including those of *The Isonomia,* 1923 A.M.C. 132 (2 CCA, 1922), 285 Fed. 516; *Blambery Brothers v. United States,* 1923, 260 U.S. 452, 1923 A.M.C. 50; *Cross v. United States* (SDNY, 1923), 1923 A.M.C. 468, 8 Fed. (2d) 86; *Nahmeh v. United States,* 1925, 267 U.S. 122, 1925 A.M.C. 457; *Eastern Transportation Company v. United States,* 1927, 272 U.S. 675, 1927 A.M.C. 174; *Kunlig Jarnagsstyrelsen v. United States,* 1927 A.M.C. 866, 19 Fed. (2d) 761 (2 CCA, 1927); *Carroll v. United States,* 1943 A.M.C. 339, 133 Fed. (2d) 690, 692 (2 CCA, 1943); *Sportiello v. United States,* 1944 A.M.C. 970 (EDNY, 1944), 55 Fed. Supp. 551; *McGhee v. United States,* 1945 A.M.C. 714, and *Abbott v. United* States, 1945 A.M.C. 728. In this case, libelant, a seaman, claimed damages as a result of certain injuries allegedly suffered on the Samuel F. Miller as a result of the rolling and pitching of the vessel. In his libel, as in the instant matter before the Court, he did not disclose whether or not he was a resident of the Southern District of New York and also was silent on his place of business. The libel contained no article alleging that at the time of filing of the libel the ship was within the territorial waters of the United States. In the course of the hearing, it developed that the libelant was not a resident of the district and that the vessel was not in the Port of New York when the libel was filed.

Amongst others, the Court posed these all-important questions:

> "2. When the statute talks about the district in which a suit in Admiralty may be brought against the Government (46 U.S. Code 742; 'the district in which the parties so suing, or any of them, reside or have their principal place of business in the United States, or in which the vessel or cargo charged with liability is found') was it setting up a limitation on jurisdiction over the subject matter, or was it merely defining venue?
>
> "3. If the statutory language concerning the proper district for the commencement of the suit is not jurisdictional, does a respondent waive the point by pleading to the merits, when the libel itself is silent on libelant's residence or place of business, and on the location of the vessel involved?"

After considering all of the relevant cases as above set forth and commenting upon them at length, the Court stated:

> "It surely is legitimate to conclude from this that Congress did not favor the bringing of suit in any district that the libelant might select regardless of the statute, and was unwilling to make it possible for government law officers, either by express assent or by inaction or inadvertence, to permit the suit to proceed in the district of libelant's choice."

The Court, in concluding, stated:

> "I conclude that a libel under the Suits in Admiralty Act, which contains no averment within the letter of the statute concerning the residence

> or place of business of the libelant, or the location of the offending vessel, is completely defective, that, if at the trial the libelant does not bring himself within the statutory language concerning the place of suit the court is without jurisdiction, that no government law officer has a right to waive the point and that the court is under a duty to raise it of its own accord."

As has been stated, appellant here did not prove his residence as being within the district at the time of the filing of the libel, nor did he prove the vessel to be within the jurisdiction of the United States or her possessions.

THE UNITED STATES DID NOT AND COULD NOT WAIVE THE QUESTION OF JURISDICTION.

As has heretofore been pointed out, all questions of jurisdiction were reserved to the Court, and until all evidence was heard the jurisdiction or lack thereof of the Court could not be determined. As pointed out in *Abbott v. U. S.,* supra—

> "It is argued, nevertheless, that his non-residence here is at most a mere matter of venue, and that respondent, by pleading to the merits, has waived objection thereto. Commercial Trust Company v. U. S. Shipping Board, 48 F. (2d) 113; Kunglig Jarnvagsstyrelsen v. United States, 1927 AMC 866, 19 F. (2d) 761. The general rule that I am thus asked to follow is, I think inapplicable here. Respondent's response to libelant's averment of residence in this district put a material fact in issue, and it, if libelant is to prevail, like

other affirmative and material allegations of the libel, must be proved.

"In other words, the fact that libelant did not reside within this district did not appear on the face of his libel, and respondent was thus in no position to raise the question before the date of trial. See *Roberts v. Lewis,* 144 U.S. 653."

The case of *Roberts v. Lewis,* 144 U.S. 582, states:

"* * * Whenever the jurisdiction of the Circuit Court of the United States depends upon the citizenship of the parties, it has been held from the beginning that the requisite citizenship should be alleged by the plaintiff, and must appear of record; and that when it does not so appear this court, on writ of error, must reverse the judgment, for want of jurisdiction in the Circuit Court."

and also:

"* * * The necessary consequence is that the allegation of the citizenship of the parties, being a material allegation properly made in the petition, was put in issue by the answer, and, like other affirmative and material allegations made by the plaintiff and denied by the defendant, must be proved by the plaintiff. The record showing no proof or finding upon this essential point, on which the jurisdiction of the Circuit Court depended, the judgment must be reversed, with costs, for want of jurisdiction in the Circuit Court, and the case remanded to that court which may, in its discretion, either dismiss the action for want of jurisdiction, or set aside the verdict and permit the plaintiff to offer evidence of the

citizenship of the parties. *Continental Ins. Co. v. Rhoads,* 119 U.S. 237 (30:380)."

The case of the *Eastern Transportation Company,* 272 U.S. 675, does not lay down any such rulings as are claimed for it by appellant nor is it any way relevant in the instant matter. The case merely holds that the sovereignty of the United States raises a presumption against its suability unless it is clearly shown, and further holds that the United States is liable for injuries done to a merchant vessel resulting from failure to mark a wreck.

Appellant cites the case of *Commercial Trust Company v. United States Shipping Board, Emergency Fleet Corporation,* 248 Fed. (2d) 113, as standing for the proposition that "an action under the Jones Act could be maintained against the shipping board wherever it was resident." The case involved the collection of a maritime loan and that it is not here in point is obvious.

The cases of *Caceres v. United States Shipping Board, Emergency Fleet Corporation,* 299 Fed. 968, and *Leon v. United States Shipping Board, Emergency Fleet Corporation,* 286 Fed. 681, as well as *Panama Railroad v. Johnson,* 289 Fed. 964, involved only the Jones Act, standing alone, and the jurisdictional requirements imposed by the Suits In Admiralty Act were not involved or before the Courts, as is here the case.

It has been stated on page 30 of appellant's brief that in the case of *Blamberg Bros. v. United States,*

supra, the Court did not have occasion to consider the question of waiver as to venue. What the Court did decide, as previously pointed out, was that the question as here was one of jurisdiction rather than venue.

We fail to perceive the relevancy of the case of *Armit v. Loveland* (CCA 3), 115 Fed. (2d) 308, and *Hust v. Moore McCormack,* 90 L.Ed. (Adv. Ops.) 1220, at 1229, to the matter under consideration. The cases in question merely tend to show the Court's liberalty in the seamen's favor but we seriously contend and believe that no right can be given where one does not exist nor can jurisdiction be vested contrary to the statutes of the United States.

Appellant devoted much space to the claim that all the privileges without impairment given to the seamen by the Jones Act were preserved by Public Law 17 and its features incorporating the Suits In Admiralty Act. Nothing could be further from the fact or law.

Appellant devotes a substantial portion of his brief to relating the traditional right of seamen under the Jones Act in which Act no reference is made to suits brought against the United States of America. The Jones Act created a right in favor of seamen only against private ship owners. It cannot seriously be contended that this statute in any way waived the sovereign immunity of the United States; therefore, it appears certain beyond any challenge that the Jones Act conferred no right in appellant's favor against the United States of America.

> "A cause of action under the Jones Act is based on negligence and when brought against the Government has to be prosecuted in Admiralty, because of the requirement of the Suits In Admiralty Act * * *." *Desrochers v. United States,* 105 Fed. (2d) 919.

The measure of the liability of the United States to an injured seaman is governed by the principles laid down in the Jones Act, but jurisdiction to hear the cause of action is derived from Public Law 17 and the Suits In Admiralty Act, and the remedies given by said acts are exclusive in all cases where a libel might be filed under it. *Johnson v. United States Shipping Board Emergency Fleet Corporation,* 280 U.S. 319, 74 L.Ed. 451, *Crescitelli, Admx. v. U. S. and War Shipping Administration* (supra) and *Keil v. U. S. A.,* 1946 AMC 653.

This libel is brought by virtue of the Suits In Admiralty Act and Public Law 17, and appellant, by the terms of his libel, paragraph VI thereof, relied upon such acts in instituting his action.

Without the Suits In Admiralty Act and the Clarification Act (Public Law 17), neither the libelant, nor any seaman, could acquire or enforce any right arising from personal injuries against the Government. The Suits In Admiralty Act provided for a proceeding in Admiralty against the United States, and the Jones Act thereafter introduced into the maritime law a new set of principles, see *Lindgren v. United States,* 281 U.S. 38; *Johnson v. Fleet Corp.,* 280 U.S. 320, 74 L.Ed. 451, but the extent to which the seaman could

assert his newly-acquired rights against the Government depended entirely upon the conditions upon which the sovereign had given its consent to be sued, and that consent was to be found in the Suits In Admiralty Act and Public Law 17, and not elsewhere. It is clear that, as against the Government, the seaman did not receive the benefit of every provision of the Jones Act. For example, he did not become entitled to a trial at common law by a jury in a suit against the United States in any Court but was restricted to the enforcement of his rights by a proceeding in Admiralty. Furthermore, he is now required to file a written claim pursuant to Public Law 17, and the United States has sixty days within which to act upon said claim, before a libel can be commenced. These requirements were, of course, not necessary under the Jones Act. It is crystal clear that the "rights" referred to in Public Law 17 are rights against the Government, and such "rights" are by the terms of Public Law 17 expressly subject to the two-year limitation provided by the Suits In Admiralty Act which require that libelant bring such "suits * * * in the District Court of the United States for the district in which the parties so suing, or any of them, reside or have their principal place of business in the United States, or in which the vessel or cargo charged with liability is found * * * ."

Piastik, Admx. v. United States of America, 1944 AMC 1350;

Keil v. United States of America, supra;

Kakara v. United States of America, supra.

It will be observed that it has been held that the limitations provided for by the above-quoted Suits in Admiralty Act rather than the seamen's rights under the Jones Act are controlling in a case of this nature.

We believe that it has been shown that the jurisdictional requirements contained in the Suits in Admiralty Act are conditions absolute and precedent which must be met without qualification before jurisdiction is vested. Unless and until such requirements, and each of them, are met, the District Court has no jurisdiction to entertain a cause of libel against the United States. Being conditions absolute and precedent, they are jurisdictional in nature and consequently can not be waived.

We contend that if the terms of the sovereign's consent to be sued are not complied with, the Court is without jurisdiction.

In *Phalen v. United States,* 32 Fed. (2d) 687 (C.C.A. 2nd), in reversing the decision of the trial Court, the Circuit Court of Appeals stated:

> "Jurisdiction may be challenged at any stage of the proceedings. Panama Ry. Co. v. Johnson (C.C.A.), 289 F. 964, affirmed 264 U.S. 375, 44 S. Ct. 391, 68 L. Ed. 748. The Public Vessels Act grants jurisdiction against public vessels which had been theretofore denied. Such a grant of jurisdiction must be clearly shown, and doubt as to the construction of the provisions of the statute granting the same will be resolved in favor of the government."

In *Munro v. United States,* 303 U.S. 36, 82 L.Ed. 633:

> "Suits against the United States can be maintained only by permission, in the manner prescribed and subject to the restrictions imposed. Reid v. United States, 211 U.S. 529, 538, 53 L.Ed. 313, 315, 29 S.Ct. 171."

In the case of *Lynch v. United States,* 80 Fed. (2d) 418 (C.C.A. 5th), cert. denied, 298 U.S. 658, 692, the plaintiff brought an action against the United States on a War Risk Insurance Policy which policy provided that suit on the policy must be brought within a certain period of time. The action against the United States was dismissed on the ground that the failure to institute the action within the permitted time was jurisdictional and could not be waived. In its decision, the Court stated at page 419:

> "The United States Government has the sovereign right to fix the terms under which it consents to be sued. It has done so in this instance, and has not authorized the Veterans Administration or any officer of the government to alter the provisions or waive the limitation imposed. The requirement for timely institution of this action constitutes a jurisdictional condition precedent which may not be waived, or abrogated by estoppel, and which the plaintiff was required to show compliance with in order to make a prima facie case. Statutes of similar provisions have been determined so to be."

It was further stated in *Lynch v. United States, supra,* at page 420:

"It is thus made very clear that the holding of the commission was, not that, having jurisdiction over the claim upon consideration thereof, it was found to be barred by a statute of limitation, but that the language of the two-year provision of the act was jurisdictional, and placed it so beyond its power that it could not be considered at all, and that, for this reason, the petition to the extent it related to the overcharges paid on February 1, 1911, was dismissed.

"We agree with this conclusion of the Commission, that the two-year provision of the act is not a mere statute of limitation, but is jurisdictional —is a limit set to the power of the Commission as distinguished from a rule of law for the guidance of it in reaching its conclusion."

In *Minnesota v. United States,* 83 L. Ed. 235, at page 241:

"Minnesota contends that Congress has authorized suit against the United States. It is true that authorization to condemn confers by implication permission to sue the United States. But Congress has provided generally for suits against the United States in the federal courts. And it rests with Congress to determine not only whether the United States may be sued, but in what courts the suit may be brought. This suit was begun in a state court. The fact that the removal was effected on petition of the United States and the stipulation of its attorney in relation thereto are facts without legal significance. Where jurisdiction has not been conferred by Congress, no officer of the United States has power to give

to any court jurisdiction of a suit against the United States."

In *United States v. Shaw,* 84 L. Ed. 888, at page 892:

"No officer by his action can confer jurisdiction. Even when suits are authorized they must be brought only in designated courts. The reasons for this immunity are imbedded in our legal philosophy. They partake somewhat of dignity and decorum, somewhat of practical administration, somewhat of the political desirability of an impregnable legal citadel where government as distinct from its functionaries may operate undisturbed by the demands of litigants."

To the same effect, see:

Stanley v. Schwalby, 40 L. Ed. 960, at page 965.

In *The Isonomia, supra,* at page 520:

"In interpreting the Act permitting as it does a suit to be brought against the United States, we must follow the rule of strict construction. This follows from the fact that the United States can not be sued without their consent, and, if Congress in certain cases gives its consent, the courts are confined to the letter of the statute which expresses such consent * * * And all the provisions of such statute are jurisdictional. As the liability and the remedy are created by the statute, the limitations of the remedy are regarded as limitations of the right."

Admittedly, the Supreme Court criticized portions of the decision of the Circuit Court of Appeals in

The Isonomia case but not with reference to the proposition of law set forth in the above quotation.

In *American Jurisprudence,* 54, at page 643:

> "Congress has an absolute discretion to specify the cases and contingencies in which the liability of the Federal Government is submitted to the courts for judicial determination, and the right to sue is limited to precisely those cases, both in regard to parties and the cause of action, as Congress may prescribe. In order to maintain a suit against the United States one must bring himself clearly within the terms of some statute authorizing suits of the character which he seeks to prosecute; otherwise, the court cannot exercise jurisdiction. Permission of the United States to be sued will not be implied, and statutes granting consent to suit are strictly construed, and are not to be extended beyond their plain language."

We do not believe the arguments of appellants, with respect to this case being governed only by the Jones Act and subject therefore only to the requirements of the Jones Act, are worthy of a further reply. It is obvious and fundamental as we heretofore have pointed out at length that without Public Law 17 incorporating the Suits in Admiralty Act, the libelant would have been without cause of action. Indeed in his libel the appellant claims jurisdiction pursuant to the terms of the Suits in Admiralty Act.

THE QUESTION OF A TRIAL DE NOVO BY THIS COURT.

On page 33 of brief, appellant claims the right of this Court to try this case *de novo* and asks a decree for libelant if the records indicate such a decree is in order. In support of this proposition, he cites only the following cases:

Brooklyn Eastern District Terminal v. U. S., 287 U. S. 170, 73 S. Ct. 103, 77 L. Ed. 240;

Linquist v. Dilkes (CCA 3rd), 127 Fed. (2d) 21;

Peterson v. Crickett Shipping Co. (CCA 9th), 71 Fed. (2d) 61.

In all of the cases cited by appellant, full hearings were had in the District Court, in which full findings of fact were made. In none of the cases did the Circuit Court of Appeals pass upon the facts in the first instance and without the District Court first having done so. Appellant in effect asks this Court to sit as a trier of the facts in the first instance under the guise of calling such as first factual adjudication trial *de novo*. A search of the authorities reveals no such successful attempts. This Court is not in a position to judge the credibility of the witnesses which appeared before the district judge, some of whom were in conflict. This Court does not have the opportunity to see the witnesses and judge their appearance, manner or credibility and is thusly deprived of all these important factors involved in a factual adjudication. To appellee the term "de novo" means:

> "Anew; afresh; a second time. A venire de novo is a writ for summoning a jury for the sec-

ond trial of a case which has been sent back from above for a new trial." (Black's Law Dictionary 3rd Rev., p. 769.)

Also:

"Anew; afresh. When a judgment upon an issue in part is reversed on error for some mistake made by the court in the course of the trial, a venire de novo is awarded, in order that the case may again be submitted to a jury." (Bouvier's Law Dictionary, 3rd Rev., p. 769.)

Both of the foregoing definitions imply the necessity for a full determination by a lower Court before there can be a *de novo* adjudication. A trial *de novo,* therefore, cannot be by its very nature a first adjudication such as is here sought.

As heretofore stated, the appellee does not concede that this Court by virtue of its *de novo* powers should, or will, sit as the initial trier of fact in this case. Should, however, this Honorable Court, after considering the jurisdictional question, in its wisdom decide to sit as a trier of the fact in the first instance, we submit the following brief reply to the voluminous statement of facts and evidence appearing in the appellant's brief.

Should this Court have occasion to consider the evidence, we respectfully refer the Court to pages 51 to 60 of this brief, wherein the pertinent facts are considered and some of the testimony quoted.

APPELLANT IS NOT ENTITLED TO RECOVER DAMAGES.

While we concede that in some cases liability can be imposed upon the ship owner because of the *known* vicious, brutal and violent character and propensities, we do not concede that such is the case in the instant matter. The cases cited by the appellant are not factual in point.

In *"The Rolph"*, 299 Fed. 52 (CCA 9th), the cruelties of the mate were well known and demonstrated prior to the commencement of the voyage. The Court in *"The Rolph"* stated:

> "From these and many other decisions, in which the courts have discussed the duty of the ship owner, we conclude that it is but reasonable to say that a ship is not properly equipped for a voyage where the mate is a man known to be of a most brutal and inhuman nature, one known to give vent to a wicked disposition by violent, cruel, and uncalled-for assaults upon sailors."

In the *Kyriakos v. Goulandris,* 151 Fed. 132, the Court found Bouritis, the assaulting seaman, to be a marijuana addict. He had threatened the libelant on many occasions and the Court found that the master knew, or at least should have known, the assaulter was a man of vicious and violent character and irrational. The case is replete with instances where the libelant had been repeatedly threatened and abused, he previously having appealed to the master for help and protection which was denied him.

In the case of *Yukes v. Globe S. S. Corporation,* 107 Fed. (2d) 888, which is cited erroneously by the libel-

ant in support of his claims, the Court denied recovery to the appellant because the assault involved was not in the furtherance of the ship's business. The Court stated:

> "The difficulty with the appellant's case is that there is nothing to connect Cope's assault upon him with discipline or the ship's business, or to bring it within the actual or constructive scope of his authority."

The Court further held that the assertion of the assaulter that "I am an officer" added nothing to the case. Thus, it is clear that all assaults are not compensable and recovery cannot always be had against the ship owner as is blatantly claimed by appellant.

In *Koehler v. Presque-Isle Transportation Co.*, 141 Fed. (2d) 490 (C.C.A. 2nd), it was determined that assaulter was one of a vicious and belligerent nature and likely to inflict bodily harm on other members of the crew and such facts were known to officers of the ship, or should have been known to them, in the exercise of ordinary diligence. In that case a serious assault had been made upon the libelant in the presence of one of the ship's officers and consequently there could be no question but that the vicious, belligerent and harmful propensities of the assaulter were known to the ship's officers.

In *Nelson v. American-West African Line, Inc.*, 86 Fed. (2d) 730 (C.C.A. 2nd), it was held that in order to permit recovery by a seaman who was assaulted in bed by a drunken boatswain, before recovery could be allowed, the boatswain must be deter-

mined to have acted within the scope of his authority in the furtherance of the ship's business.

It is obvious that the facts of the instant case do not bring us under the law laid down by any of the foregoing cases. Howland was not of a violent, belligerent or vicious nature and he had no such propensities, and the record is entirely devoid of any evidence to substantiate the statements contained in appellant's brief, as will be shown by the evidence later quoted herein.

While the vicious propensity rule applies with equal effect to officer and fellow seaman, we believe it clear that in assaults committed by fellow seaman of equal rank, no vicious propensities having been shown, liability does not attach to the vessel. Such assaults to be compensable in damages against the ship owner must be committed by superior officers in furtherance of ship's business.

Howland, a seaman in the United States Navy, was not a superior officer to appellant, nor did he outrank him, nor was he a fellow servant, nor was either of them subject to the control or under the authority of the same officer. Howland was under the sole and exclusive jurisdiction of the United States naval officer in charge of the armed guard party. The master of the vessel had no jurisdiction over the naval party, including Howland. (Tr. Vol. II, p. 141.)

In the case of *Lykes Bros. S. S. Co. v. Grubaugh,* 128 F. (2d) 387 (C.C.A. 5th), cited and relied upon by appellant, at page 391, the Court fully considers

the question of the shipowner's responsibility in "assault" cases. This excellently considered opinion states as follows:

> "The law governing the responsibility of the master for an injury from a beating administered by one employee to another, as well stated in Medlin Milling Co. v. Boutwell, 104 Tex. 87, 133 S. W. 1042, 34 L.R.A., N. S., 109, and Davis v. Green, 260 U. S. 349, 43 S. Ct. 123, 67 L. Ed. 299, is that under the doctrine of respondeat superior there is no liability for a wrongful assault committed by one employee on another unless the assault is committed, whether wisely or unwisely, in furtherance of or in an attempt to further the master's business or in other words in connection with some act which an assaulter is authorized to do for the master. In any case where the act is merely a wanton and wilful act done to satisfy the temper or spite of the employee, the master is not liable. In Jamison v. Encarnacion, 281 U. S. 635, 50 S. Ct. 440, 74 L. Ed. 1082, and Alpha Steamship Corp. v. Cain, 281 U. S. 642, 50 S. Ct. 443, 74 L. Ed. 1086, applying to assaults on shipboard, the rule of the Green case, the Supreme Court declares, that the employer may be liable under the Jones Act only when the assault is committed by one having authority over the person assaulted and then only when it is committed in the course of the conduct of the master's business. In each of those cases the assault was by a superior officer upon a subordinate employee whom the assailant had the power and authority to direct, control and discipline. No case has held a steamship company liable for an assault committed by a subordinate employee upon his su-

perior or by the head of one department upon the head or an employee of another department over whom the assailant has no authority of direction or control. None has held the master liable where as here the assault occurred as the result of anger over matters having nothing to do with the exercise, over the assailed, of authority delegated by the master to the assailant in the discharge of duties with which the master had charged him. It is appellant's position that the case fails both because the engineer had no authority or control over the steward and because if he had, the evidence not only wholly fails to establish that the assault was committed in attempting to carry out the master's business but on the contrary it affirmatively shows that it was a personal quarrel to vent the drunken spleen of the engineer."

The foregoing case was reconsidered on rehearing in 130 Fed. (2d) 25, and was affirmed; additionally, maintenance was awarded. The opinion was not otherwise modified.

This same subject was given extensive treatment by the Second Circuit Court of Appeals in the case of *Bonsalem v. Byron S. S. Co.,* 50 F. (2d) 114 (C.C.A. 2nd). At page 115, the Court states as follows:

"The ship or shipowner is not liable for injuries received by a seaman from an assault committed outside the scope of the employment of those on the vessel who are alleged to have assaulted him. This appellee was assaulted without provocation, and the assault was not committed by any officer of the vessel in furtherance of the appellant's business. The appellant did not au-

thorize the officers of the ship to beat and assault him without cause or for a reason unconnected with the navigation of the ship."

To the same effect, see *Pittsburgh S. S. Co. v. Scott,* 159 F. (2d) 373, C.C.A., Sixth Circuit (1947), at page 376:

"A willful assault perpetrated 'to satisfy the temper or spite of the employee', not done in an attempt to further the employer's business, does not render the master liable for his servant's wanton acts. Lykes Bros. S. S. Co. v. Grubaugh, 5 Cir., 128 F. (2d) 387."

See also *Brailas v. Shepard S. S. Co.,* 152 F. (2d) 849 (C.C.A. 2nd), wherein the applicable law is carefully set forth as follows:

"* * * It is well established that a master will not be liable for the negligent acts of his servant unless they are performed in the course of or in furtherance of the master's business; the fact that the injury is done during the continuance of employment is not enough. Davis v. Green, 260 U. S. 349, 43 S. Ct. 123, 67 L. Ed. 299; Bonsalem v. Byron S. S. Co., 2 Cir., 50 F. 2d 114; Lykes Bros. S. S. Co. v. Grubaugh, 5 Cir., 128 F. 2d 387, modified on rehearing 5 Cir., 130 F. 2d 25.

* * * * * * *

"* * * Even assuming, however, as plaintiff contends, that Dolanides stabbed him in an effort to regain possession of his position at the throttle, the defendant company cannot be held responsible for Dolanides' Act. An assistant engineer can hardly be said to act in furtherance of his master's business when he assaults the

chief engineer as the latter attempts to take control at a time of emergency. The case on its facts is clearly distinguishable from cases relied on by the plaintiff where a superior officer injured a seaman in the act of prodding him to work. Jamison v. Encarnacion, 281 U. S. 635, 50 S. Ct. 440, 74 L. Ed. 1082; Alpha S. S. Corp. v. Cain, 281 U. S. 642, 50 S. Ct. 443, 74 L. Ed. 1086; Nelson v. American-West African Line, 2 Cir., 86 F. 2d 730, certiorari denied American-West African Line v. Nelson, 300 U. S. 665, 57 S. Ct. 509, 81 L. Ed. 873. Hence the court committed no error in refusing to submit this issue to the jury and in refusing plaintiff's requests to charge based upon the contrary theory."

The cases of *Alpha S. S. Corp. v. Cain,* 281 U. S. 642, 50 S. Ct. 443, 74 L. Ed. 1086, and *Jamison v. Encarnacion,* 281 U. S. 635, 50 S. Ct. 440, 74 L. Ed. 1082, both involve cases under the Federal Employers Liability Act. In the former case of *Alpha S. S. Corp. v. Cain,* recovery was based upon an assault inflicted upon an employee by his superior superintendent in the course of reprimanding the plaintiff for tardiness and compelling him to work. In the *Jamison v. Encarnacion* case, a foreman struck an employee in the furtherance of his master's business for the purpose of hurrying him about his work. Neither case has any application whatsoever to the facts in the instant matter.

None of the cases cited by appellant on page 41 to and including page 45, of appellant's opening brief, have any application whatsoever to the matter before

this Court, nor do they support the point contended for or by them. None of these cases involve the authority of a master of a vessel in time of war, nor do any of them even comment upon the conflict or difference in the authorities vested in the merchant vessel master and those of United States Naval Armed Force party.

In times of war, it has been necessary to set many ancient traditions and customs aside and this was done in World War II. The merchant marine had no authority over members of the armed naval forces of the United States. This is a matter of which it is believed the Court will take judicial knowledge. We have never at any time heard of a merchant marine master taking over command of naval forces from a naval officer, although unquestionably the reverse has been true on many occasions and the merchant marine was, in the last World War, at all times subject to the control and direction of the naval forces. The only evidence adduced in the District Court on this point was that given by Lt. Commander Cowan, the executive officer of the United States Naval Armed Guard of the Pacific (Tr. Vol. II, page 141) as follows:

> "Q. Will you just tell us, Commander, what the relationship was aboard the SS. Escanaba Victory, what the relations were that existed between the members of the Armed Guard Crew of the ship and the Master of the ship and the complement of merchant officers and crew of that ship?
>
> A. The Naval Guard Officer and crew were a separate entity, a separate crew, separate and

distinct from the Master, the mates and the other personnel attached to the Merchant Marine aboard that vessel. The Master of the vessel has jurisdiction over the merchant crew aboard the vessel. The commanding officer of the Armed Guard crew has jurisdiction over the Armed Guard crew in all respects aboard that vessel.

Q. And did the Master of the Escanaba Victory or any of the complement of the merchant seamen officers aboard that ship have any jurisdiction or control whatsoever over the commander of the gunnery crew, or the men under him?

A. Absolutely none whatever.

Q. Did the Master of the ship, or any of the officers of that ship, and I mean the merchant marine officers, have any jurisdiction to reprimand or otherwise give instructions to any member of the gunnery crew?

A. In no manner.

Q. Did the Master or any of the merchant seamen or officers have any jurisdiction to punish a member of the gunnery crew?

A. Absolutely not.

Q. Did the Master or any officer under him on the ship have any jurisdiction or control over the Commander of the gunnery crew?

A. No, sir.

Q. Did the Master have any jurisdiction or did the officers under him have any jurisdiction to discharge, or relieve from duty, temporarily or otherwise, any member of the gunnery crew?

A. No, sir.

Q. Whose jurisdiction was it, or whose right was it to determine whether or not a member of the gunnery crew should stay aboard the vessel, temporarily or otherwise?

A. The Commanding Officer of the Armed Guard Unit.

Q. Did anyone other than the commander of the Armed Guard gunnery crew have the right, power or authority to displace any member of the gunnery crew?

A. No, sir."

And at page 147, lines 3 to 11 inclusive:

"Mr. Hoge. Q. Commander Cowan, did the Master or any of the merchant marine officers under the Master have any jurisdiction or authority to control the commander of the Armed Guard unit or any of the crew members of the Armed Guard unit, acting under him?

A. No, sir.

Q. Did the Master or any of the officers acting under him have any right to supervise the activities of the commander of the Armed Guard unit, or any of the members of the Armed Guard unit under him?

A. No, sir."

And at lines 17 and 21, inclusive:

"Mr. Hoge. Q. Did the Master or any of the merchant marine officers acting under him have jurisdiction or authority to displace the commander of the Armed Guard unit or any man of the Armed Guard unit under him?

A. No, sir."

Much has been said by appellant with respect to his claim that he was a fellow servant of United States Navy Seaman Howland. This Court has previously spoken with respect to the differences between

civilian fellow servants and the relationship of a soldier to his Government.

In the case of *Standard Oil Company of California v. United States,* 153 Fed. (2d) 958 (C.C.A. 9th), (1946), at page 961:

> "* * * There are, it is granted, some resemblances between the master-servant and government-soldier relationships, but the distinguishing features are so great that we do not feel that the legislature intended the words 'servant' and 'master' in § 45(c) to include within their meaning the words 'soldier' and 'government.'
>
> In modern times the freedom of an employee to enter into and to terminate a contract of employment might be said to be the major distinguishing factor between the two relationships. Labor's many other rights and privileges recognized today serve to distinguish even further the position of the modern employee from that of the soldier. Even in peacetime a soldier who enlists is subject to many strict duties and disciplines which are never impressed on the ordinary employee. See e.g. Articles 58 and 61 of the Articles of War, 10 U.S.C.A. §§ 1530, 1533. But whatever the picture in peace, in times of national emergency it is the duty of the citizen to serve in the protection of his country and every citizen is a potential soldier under the conscription laws * * *
>
> Thus the fact that this soldier (Etzel) had entered the Army under the draft for the duration of the war emergency makes the position of the soldier even less comparable to that of an employee. The trial judge ably points out the

distinctions between soldier and employee at 60 F. Supp. 810. See also McArthur v. The King (Canada) (1943) Ex. C. R. 77, (1943) 3 D.L.R. 225."

A member of the United States Navy is not considered an employee of the United States within the scope of the Suits In Admiralty Act.

Dobson v. United States, 27 Fed. (2d) 807 (C.C.A. 2nd);

Bradey v. United States, 1945 A.M.C. 777.

In the *Bradey* case, a member of the United States Navy was injured in a collision between a United States naval vessel and another vessel which was owned by the United States of America and operated under the familiar form of general agency agreement.

The Court states:

"Whether the 'Morton' be deemed a public vessel or merchant vessel, recognition of any right of a libelant to sue the United States of America for damages for decedent's injury or death even when caused by fault of another ship than decedent's, is forbidden by the public policy stated in Dobson v. United States, 27 Fed. (2) 807."

The Court in *McArthur v. The King* (1943), 3 D. L. R. 225 (Exchequer Court of Canada), after an exhaustive search of the authorities, concluded that the sovereign was not liable for the act of a member of the Armed Forces while on duty. This authority was cited in *Standard Oil Company v. United States, supra.* The Court said on pages 260, 261:

> "There is nothing to indicate in any way that the legislature to go beyond the application of the doctrine of employer's liability to the crown in the field of negligence, or that it meant to include within the scope of the doctrine persons of a class or kind to whom the doctrine as it is ordinarily understood could not apply. * * * Before the Crown shall be held responsible for the negligence of such persons to whom the doctrine of employer's liability as understood as between subject and subject, would not apply, and where the relationship of the parties is so different from that of master and servant, or employer and employee, it will require language in the statute of the clearest and most explicit kind. Any such far-reaching extension of the liability of the Crown would have to be stated in the statute in express terms."

A search of the authorities has revealed no other cases that even touch upon this subject save and except the case cited by the appellant, *DeWitt v. United States of America,* 1946 A.M.C. 1222, which is a case decided by the District Court of the Western District of Washington. This case is by no means in point. The facts in the DeWitt matter were that the libelant was injured by the alleged negligence of a soldier who was operating the ship's winches in the course of discharging the vessel at Okinawa. This soldier was replacing and doing the work of a seaman or stevedore and was assisting in the necessary ship's business of discharging. The Court held that the mere fact that the winch driver also served contemporaneously as a member of the Armed Forces would not

defeat libelant's right to indemnity from the vessel. The Court reasoned that the soldier winch driver was serving in a dual capacity as a member of the ship's company and also contemporaneously as a member of the Armed Forces. The Court further goes on to say:

> "In considering and ascertaining whether or not the winch driver at the time, place and environment of the accident was engaged with the injured oiler in maritime duties within the meaning the broad protective provisions of the statutes applicable to this libel, it should be noted that no wartime activities were then being performed by either. The work of each was essentially a post-war maritime service, not dissimilar in character to the duties performed by the injured man and the stevedore, respectively discussed by the Supreme Court in International Stevedoring Company v. Haverty, 272 U. S. 50, 1926 A.M.C. 1638."

Thus, it will be seen that the Court went to great pains to hold that the winch driver was not engaged in wartime activities and that he was doing the work similar to that of the injured seaman or to the stevedore. It may be noted at this point that the case of *International Stevedoring Company v. Haverty,* supra, involved injuries suffered by a stevedore. It will be further noted that the Court found it not necessary to characterize the soldier winch driver as an employee of the United States. It would appear appropriate to inquire as to whether Howland was engaged in wartime activities or the duties of a merchant seaman. Howland, as the record will show, was on roving patrol in time of war. (Tr. Vol. II 107.)

His duties, obligations and orders given him by the United States naval officer in charge of the naval crew were clearly described by Lt. Commander Cowan. (Tr. Vol. II, 146, lines 1 to 26.)

It is apparent that DeWitt in the case of *DeWitt v. United States of America,* supra, was engaged in post-war maritime ship's business of discharging the vessel's cargo. Howland in this case was on active naval duty during wartime and was not engaged in seamen's or stevedore's work in conjunction with the operation of the ship's business. Howland was not replacing or doing the work customarily performed by the ship's personnel or stevedores.

We are unable to comprehend the relevancy of the holding in *Norton v. Warner Co.,* 321 U. S. 565, 88 L. Ed. 931. In this case, the Court decided what constituted the crew of a barge. The naval forces were not aboard the barge and we cannot conceive of any application of that ruling to the matter before this Court. The case arose under the Longshoremen's and Harbor Compensation Act.

Appellant quoted Public Law 17 in an effort to show that it gave to merchant seamen all of the rights they could have had against private ship owners. We believe it clear beyond any doubt that a private ship owner would not be liable to one of its seamen for an assault by a member of the armed forces whether the assaulting member of the armed forces was negligent or otherwise.

The case of *Hansen v. United States,* 12 Fed. (2d) 321, cited by appellant, merely holds that under the Jones Act the defense of negligence of an officer or fellow servant is not a defense. This case likewise has no application to the questions before this Court.

Libelant claims to be entitled to a decree of the United States even if Howland is not found to be a member of the crew. This claim arises, as it will be observed, out of the shooting, the claimed tort feasor being a member of the United States naval forces. He was not, as we have shown, one of the merchant crew, or a fellow servant of appellant. The United States has never waived its sovereign immunity with respect to torts committed by members of the armed forces. For instance, injuries suffered by members of the public on a military reservation are non-actionable. None of the cases cited by appellant are in point.

The cases of *United States Fidelity Guarantee v. United States,* 56 Fed. Supp. 45, and *Moran Towing and Transport v. United States,* 56 Fed. Supp. 104, and *Marin v. United States,* 65 Fed. Supp. 111, and *The Canadian Aviator, Ltd. v. United States,* 324 U. S. 215, have no application to the case at bar and are not in point.

THE QUESTION OF INSURANCE BENEFITS.

Appellant in his Statement of the Pleadings and Jurisdiction says:

> "This is a seaman's libel in personam for benefits under the Second Seaman's War Risk Policy

and for damages for personal injuries and maintenance and cure * * *"

On page 5 of the brief under "II. Statement of the Case and Summary of the Evidence," he says:

> "This is a seaman's libel in personam against the United States, wherein the libelant Earl P. Hoiness seeks the following relief:
>
> '(1) * * *
>
> (2) For benefits under the Second Seaman's War Risk Policy in the amount of $650. * * *' "

On page 16 of his brief under "IV, Summary of Argument, D. The Question of Insurance Benefits," appellant states:

> "The United States during the war provided insurance policies for merchant seamen injured while in its employ aboard merchant vessels of the United States as the result of war risks. This case is certainly one covered by the language and intent of these policies. Were it not for the fact that the armed guard of which Howland was a part were aboard the 'Escanaba Victory', it is fair to say that libelant would not have been grievously injured as happened here. This certainly is one of the risks contemplated by the insurance policy, particularly if it is given the liberal and remedial construction that should be accorded any statute passed for the benefit of merchant seamen who are peculiarly the wards of the Admiralty."

Appellant again, under "V. Argument B (4) *Libelant is entitled to recover war risk insurance benefits,*" states:

> "It seems clear to us that had it not been for the war the gun crew would not have been aboard the ship. The incident which happened in this case would not have happened and libelant would not have been grievously hurt. * * *"

Appellant then proceeds to quote the provision of the Second Seaman's War Risk Insurance Policy requiring direct and proximate causation by risks of war and warlike operations, and to cite the cases of *Crist v. U. S.,* 1946 A.M.C. 170, and *Murphy v. U. S.,* 1946 A.M.C. 378, in support of the said argument.

It is questioned by appellee that the matter set forth in appellant's brief under the headings "Summary of Argument" and "Argument" can be properly classified as argument. Statements that "This is certainly one covered by the language of the Act, etc." and "This certainly is one of the risks contemplated by the insurance policy," hardly warrant such a classification.

As appellant has cited the *Crist* and *Murphy* cases he must have intended to make the "but for" argument on the basis of restraint, to the effect that where a restraint has taken place any loss which subsequently occurs may be fairly attributed to the taking and the party seeking recovery under a war risk policy is relieved from strict compliance with the rule of proximate cause.

It is a fundamental principle of marine insurance that *causa proxima non remota spectatur,* and that the underwriter is liable for no loss which is not proximately caused by a peril insured against.

The rule has been thus stated as follows by the Circuit Court of Appeals of the Second Circuit:

Queens Ins. Co. v. Globe & Rutgers Fire Ins. Co., 282 F. 976, 987.

"In order to impose liability under the war risk clause policy, all forms of hostilities or warlike operation of whatever kind must consist of some form or kind of hostility or warlike operations which have proximately caused the loss. Remote consequences of hostilities cannot become a recoverable loss, even if they may be said to be proximately caused by something itself ascribable as a consequence of hostilities."

The case of *Crist v. U. S.*, 1946 A.M.C. 170, was reversed by the Third Circuit of the Circuit Court of Appeals in 1947 A.M.C. 932. The Court considered the subject of restraint at length and in reversing the District Court found that the testimony established that the loss of

"the 'Maiden Creek' was not the result of a warlike operation or of any conduct insured against by the war risk policy * * *"

On page 943 the Court quoted from the English case of *Harrisons, Limited v. Shipping Controller,* (1921), 1 K. B. 122, 421 L. Rep. 429, page 131. One sentence is particularly pertinent.

"It seems proper to distinguish between wartime conditions of merchantman traffic and the actual occurrence of warlike operations."

In *Dennehy v. U. S.*, 15 F. (2d) 196 (S.D.N.Y. 1926), the Court dismissed a libel brought to recover

the proceeds of a World War I seaman's war risk policy and declared:

> "The mere fact that in time of war a member of the crew of a merchant vessel, carrying munitions of war, is injured or loses his life and has a policy covering him against 'war risks' does not entitle him or his representatives to recover against the one so insuring is clear, even though a very broad construction be adopted. Injury or death must be the result of a risk of war. The war must be the proximate cause."

See also *Gadsden v. U. S.*, 54 Fed. Supp. 151 (D.C. Md. 1944).

The proper and well-settled rule of construction of the Seaman's War Risk Policy is enunciated in *Bean v. U. S.*, 7 F. (2d) 393 (D. Kan. 1925), where the Court declared, at 396:

> "War risk insurance is a special statutory kind of insurance and contracts issued thereunder are not to be interpreted and construed according to the principles of law governing accident insurance or other contracts of insurance. Sternfeld v. U. S., 32 F. (2d) 789 (N.D. N.Y. 1929)."

It seems "clear" to us that a consideration of the facts of this case in light of the above authorities leads to the conclusion that the case is "certainly" *not* one covered by the language and intent of the Second Seaman's War Risk Policy and that it "certainly" is not one of the risks contemplated by the policy, and that appellant is entitled to recover nothing thereunder.

ASIDE FROM JURISDICTIONAL QUESTION THE FACTS AND EVIDENCE OF THE CASE WOULD CLEARLY NOT SUPPORT AN AWARD IN APPELLANT'S FAVOR.

Howland, a seaman first-class of the United States Navy, was a member of the Navy Armed Guard aboard the "Escanaba Victory". Howland was under the direct orders of Lieutenant Mixon of the United States Navy. The vessel was manned and navigated by a merchant crew under the command of a merchant master.

The subject matter of this cause occurred during World War II at a time when all security regulations were in full force and effect and being enforced by the appropriate military authorities.

Howland was sworn into the Navy on December 10, 1942, and was ordered aboard the "Escanaba Victory" by the Navy on June 29th. He received his honorable discharge from the Navy November 25, 1945. (Tr. Vol. II, 101.) Upon discharge, he received a Navy citation for meritorious conduct. On the 16th of January, 1945, when the vessel was at San Francisco, having just completed a voyage to foreign waters, Howland was assigned the 12 to 4 watch by the Naval Officer in command of the Navy party (Tr. Vol. II, 106, 107) and his duties were those of a roving patrol. In the course of Howland's watch, he was directed by Lieutenant Commander Wilson of the United States Coast Guard, to locate a member of the crew, one Holleman, and to produce him before the Lieutenant Commander. (Tr. Vol. II, 108.) Howland's duties as roving patrolman took him about the entire vessel.

(Tr. Vol. II, 112.) During the search for Holleman, Howland looked in the boatswain's forecastle in which there were five or six men. Appellant called Howland an extremely vile name. (Tr. Vol. II, 126, 128.) (Please see record for actual name.) There was no provocation for this conduct upon the part of appellant. Howland merely inquired as to the whereabouts of the party he was seeking. Appellant accused Howland of trying to run the whole ship (Tr. Vol. II, 110), and endeavored to force Howland, who was then on duty, to go down on the dock which Howland properly refused to do. Howland was carrying side arms consisting of a .45 Colt automatic which was standard equipment for roving guards. (Tr. Vol. II, 111.) Appellant at the time knew Howland was on duty and knew that Howland should not be interfered with. (Tr. Vol. II, 39.) During all of the times involved appellant, who had been drinking whiskey, was heavily liquored (Tr. Vol. II, 109, 131), and in addition to the vile name previously referred to, he called Howland a "Communist". (Tr. Vol. II, 39.) Howland thereupon drew his service pistol but later returned it to its holster. Howland then proceeded about his business in search of Holleman down the passageway. Appellant and several other merchant seamen (Tr. Vol. II, 113) who were in an ugly mood and who had been drinking (Tr. Vol. II, 124) followed Howland and still persisted that he fight appellant on the dock. This Howland refused to do. Appellant's companions goaded appellant on, making suggestions that he should take Howland's gun away from him and do certain things with it. (Tr. Vol. II, 111, 112.)

Appellant then grabbed Howland by the jumper and slammed him against the bulkhead. (Tr. Vol. II, 112.) At this time Howland's gun was still in his holster. Following this, appellant called Howland another vile name (Tr. Vol. II, 113) and drew back his left hand in a manner indicating he intended to strike Howland. At this point Howland justifiably drew his side arm and shot appellant. Howland thereafter summoned a doctor and immediately surrendered himself and his gun to his superior officer. Appellant thereafter was taken to the San Francisco Hospital and later to the Marine Hospital, suffering disability for two and one-half months. (Tr. Vol. II, 22, 23.) Prior to entering the United States Maritime Service, appellant was a truck driver by occupation. Upon being released from the Marine Hospital, he obtained work as a bartender and later purchased his own nightclub.

Appellant urges that the record shows Howland had a reputation for violence and that he accordingly should have been restrained. He bases this conclusion solely upon the unsupported testimony of appellant who admitted that he had previously testified before a Naval Court of Inquiry to the contrary (Tr. Vol. II, 49, line 24 to and including 50, line 1):

> "Q. But you still feel in your own heart that Howland did not mean to shoot you or shoot the gun off?
>
> A. Yes, sir."

Appellant admitted that he had no previous altercation with Howland at any time (Tr. Vol. II, 32, lines 2, 3, and 4):

"Q. You never had any fist fight or anything of that sort with Howland during this entire voyage, did you?

A. No, sir."

Howland had never been reprimanded by anyone. (Tr. Vol. II, 102, 103.) He had never threatened anyone. (Tr. Vol. II, 102, 103.) His attitude was not threatening toward members of the merchant crew and he had never been seen to strike or threaten anyone. (Tr. Vol. II, 131.) Just prior to the casualty, he had been commended for his conduct by the master of the vessel. He was honorably discharged from the United States Navy and received a Navy citation for meritorious conduct. (Tr. Vol. II, 101.) He had never entered into any arguments or fights with any of the members of the merchant crew. (Tr. Vol. II, 104.)

Much is made by appellant of an occasion when it was claimed by appellant that Howland pushed a member of the merchant crew from one of the vessel's life boats, although appellant himself didn't witness the occurrence. The fact of the matter is the shore party was aboard the vessel's small boat at an amusement beach where they engaged in horseplay. (Tr. Vol. II, 104.) There was no fight of any kind. A total of sixteen of the party went overboard, Howland included, who could not swim a stroke. (Tr. Vol. II, 104.) Appellant claimed that Howland was in command of the shore party boats, and would give preference to naval personnel. The fact is that only 50% or 14 in number of the naval crew could go ashore at

any one time. The shore boat carried a total of 35, leaving space for 21 of the merchant crew. (Tr. Vol. II, 105, 106.) Howland was not in charge, nor did he have any control over the shore boats or who entered them. (Tr. Vol. II, 117.)

There is no escape from the fact that Howland was on naval duty at the time of the shooting; however, it is the position of the appellee that appellant was mad at Howland and that he engaged Howland in a personal argument at which time appellant was drunk and the aggressor. The shooting resulted after appellant had threatened and attacked Howland, he first having called him vile and insulting names. Howland acted solely in self-defense. Appellant who had been drinking knew that Howland was on duty and knew that he should not be interfered with (Tr. Vol. II, 35, lines 15 to 19 inclusive):

> "The Court. Q. Under what circumstances did the drinking take place? Did you have a bottle among yourselves?
>
> A. There was a full bottle in the boatswain's forecastle and it was passed around and each one had a drink. That happened about five minutes before the shooting."

(Tr. Vol. II, 36, lines 11 to 20 inclusive):

> "Q. Mr. Hoiness, referring to the matter of your drinking on the ship this particular day. Do you wish to state as a matter of record that you took only one drink?
>
> A. No. I would not say one drink. I would say four or five drinks I had in the boatswain's focsle after I got back from town.

Q. Do you remember what type of liquor it was?

A. No, I don't. Three Feathers, I believe."

Knowlton, a sailor in the United States Navy, testified as follows concerning appellant (Tr. Vol. II, 131, lines 24, 25, and 26):

"Q. What was his condition, if you could observe it, as to whether or not he was drunk or sober.

A. He had been drinking."

In this regard, Howland testified as follows (Tr. Vol. II, 109, lines 21, 22, 23, and 24):

"Mr. Hoge. Q. I will direct your attention to Mr. Hoiness, the libelant here: What was his condition as you observed it as to intoxication or sobriety?

A. He had been drinking heavily."

Appellant himself testified (Tr. Vol. II, 39, lines 1 to 7 inclusive):

"Q. Assume he was what is known as a roving guard. You know from your experience on that ship that his duties carried him all over that vessel, is that right?

A. Yes.

Q. Now, as a guard connected with the United States Navy on duty carrying side arms, you knew that the man was not to be interfered with in the performance of his duty, didn't you?

A. Yes, sir."

Appellant again testified before a Naval Court of Inquiry (Tr. Vol. II, 39, line 21 to 40, line 3 inclusive) as follows:

"Q. Down by the boatswain's focsle, what was the nature of the argument that you had with Howland? What was said by yourself and by him?

A. I guess I called him a Communist or something, the way he tried to run the gun crew on the last trip, which wasn't any of my business, and started the argument. He was always trying to cause trouble between the gun crew and the merchant crew and that is what the argument started over."

Appellant further testified as follows (Tr. Vol. II, 42, lines 19 to 24 inclusive):

"Mr. Hoge. Your Honor, I will read from page 76, line 49: 'Q. After this argument, is it true that Howland walked away and you and four or five men followed him? A. Yes, sir. Q. You were pretty mad at Howland at this time? A. Yes, sir.' "

(Tr. Vol. II, 44, line 3 to and including line 20):

" 'Q. Will you tell me again about those four or five men that followed you down the passageway. Who were they and what was your purpose in following the defendant? A. I was just going down more or less to finish out the argument. He was going to turn us in to the Coast Guard for arguing with him, so I went down to ask him if that is what he was figuring on doing, turn me in to the Coast Guard for arguing with him. Q. You testified that you followed him down there for the purpose of finishing the argument, didn't you? A. I must have. Q. Now, Mr. Hoiness, you knew, to repeat the question I asked you before,

you knew that this man was on duty, on Navy duty, carrying a side arm, a .45 Colt Automatic gun, didn't you? A. Yes, sir. Q. And after this argument that he had had, when you told him to shoot you, he put the gun in the holster, didn't he? A. Yes. Q. And he walked away, didn't he? A. Yes, sir.' "

As to the attitude and intentions of appellant, Howland explained the existing situation as follows (Tr. Vol. II, 124, lines 6 to 11, inclusive):

"Q. Did you think it was necessary to shoot him in order to prevent yourself from being hit?

A. I was not mainly concerned with Hoiness. He was backed up by quite a group of guys that had been drinking and were in a pretty ornery mood.

Q. You were concerned with the other men?

A. I was concerned with all of them."

The opprobrious epithets that were hurled by appellant at Howland (Tr. Vol. II, 126 and 128) were testified to by witness Crandall, an employee of Young's Patrol.

As to the actual physical assault of appellant upon Howland, the following was testified to (Tr. Vol. II, 112, line 6 to 113, line 6 inclusive):

"Q. Where did you go?

A. I was still seeking Holleman under orders of Lieutenant Commander Wilson.

Q. Where did you go?

A. I went down the passageway into the merchant marine mess hall.

Q. Did you find Holleman down there?

A. No, sir.

Q. Then what occurred after that?

A. I was standing at the door in the same position I was at the door in the boatswain's forecastle and I turned around and Hoiness grabbed me and slammed me up against the bulkhead.

Q. When he grabbed you and slammed you up against the bulkhead, what did you do, if anything? Did you try to get away or grapple with him?

A. He had his right hand holding on to my undress blue jumper. It is quite loose and he had me tied up against the bulkhead.

Q. At this time did you have your gun in the holster?

A. It was in the holster.

Q. And you were on duty as a guard at that time?

A. I was.

Q. You were performing duties that you had been instructed to perform by your commanding officer?

A. That's right.

Q. When he threw you up against this bulkhead, then what happened?

A. He said, 'I will teach you to pull a gun on me, you son of a bitch.'

Q. Then what happened?

A. Then he drew back his left hand which was right opposite to my right hip, in a low position, and I didn't know whether he was going to strike me or take the gun away from me."

For corroboration of this, Knowlton, a sailor in the United States Navy, testified as follows (Tr. Vol. II, 133, line 19 to and including 134, line 4):

"Q. Did Hoiness and Howland meet when they got down to the other end of the alley way, or just state what took place at that time and place?

A. I was standing by the galley and Howland was looking in the mess hall for Holleman. Howland turned around and Hoiness grabbed him by his jumper.

Q. You have the same sort of uniform, haven't you? Demonstrate to His Honor where Hoiness grabbed him?

A. Hoiness grabbed him right up on the jumper around with his right hand and drew back with his left hand and there was something said about a Communist and a son of a bitch and then Red drew the gun and shot him."

APPELLANT IS NOT ENTITLED TO MAINTENANCE.

Appellant is not entitled to any consideration with respect to his claim for maintenance under the circumstances of this case.

In *Lortie v. American Hawaiian Steamship Co.,* 78 Fed. (2d) 819 (C.C.A. 9th), where a seaman was injured in fighting with another member of the crew, it was said at page 821:

> "There can be no question that, if the appellant was injured during a drunken brawl, he can recover neither damages nor maintenance and cure."

In *Meyer v. Dollar Steamship Line,* 49 Fed. (2d) 1002 (C.C.A. 9th), where a seaman sued for maintenance and cure and wages for an injury suffered while

scuffling with another member of the crew, it was said at page 103:

> "However, when he commenced his good-natured scuffling with his fellow shipmate the situation was changed. Appellant by his own volition created an extraneous circumstance; he brought about an intervening cause that directly affected his relations to his employer and to the ship."

And the Court held that such injuries were not received in service of the ship.

In *Brock v. Standard Oil Company of New Jersey,* 33 Fed. Supp. 353, at 355, where a libelant sustained a broken hand in a fight with another crew member, it was said:

> "There remains the action for maintenance and cure. Since the libelant's injury was due to his own willful misconduct and since there was not negligence on the part of the respondent, there can be no recovery for maintenance and cure by libelant."

CONCLUSION.

It is respectfully submitted that:

1. The District Court properly dismissed this cause for lack of jurisdiction and this Court should sustain the ruling dismissing the libel for lack of jurisdiction;

2. The cause should not be heard *de novo* by this Court;

3. Appellant is not entitled to a decree on the facts aside from the jurisdictional questions;

4. Appellant is not entitled to War Risk benefits.

Dated, San Francisco,
September 8, 1947.

Respectfully submitted,
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